Testimony of Wiley Stem

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of the

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Table of Contents

Summary of the Testimony of Wiley Stem

Segments of the North Bosque River upstream from Lake Waco have been determined by both the Texas Commission on Environmental Quality ("TCEQ") and by the United States Environmental Protection Agency ("EPA") to be so impaired due to high concentrations of nutrients, principally phosphorus, that they have been placed on the national list of impaired waters. The high levels of phosphorus have led to high rates of algae growth downstream in Lake Waco, which is causing severe taste and odor problems with drinking water from Lake Waco. Lake Waco is the public drinking water supply for approximately 150,000 central Texas citizens who live in the City of Waco and surrounding communities.

Numerous studies and peer reviewed publications have concluded that the high concentrations of phosphorus in Lake Waco are being caused by the runoff of phosphorus from dairy CAFO waste application fields located in the North Bosque River watershed. This runoff occurs as a result of these dairies over-applying manure from their dairy cows to their waste application fields. These dairies apply manure to their fields not for agronomic purposes, but rather as a means of waste disposal. These dairy CAFOs are not traditional "family farms."

If Congress passes an amendment of CERCLA which provides that animal manure and anything in it is not a hazardous substance under CERCLA, the City of Waco's efforts to reduce pollution from these large dairies and to protect water quality will be severely hampered. Potential liability under CERCLA is critical to stopping the dairies from continuing to over-apply waste to their fields, and thus eliminate taste and odor problems downstream. This committee should oppose the proposed amendment.

I. Introduction

My name is Wiley Stem. I have been an employee of the City of Waco for the past 29 years. Over that time I have worked as a management analyst, assistant director of public works, water/wastewater supervisor, and director of water distribution and wastewater divisions. In 1999 I assumed a position as Assistant City Manager, which is the position I currently hold. As Assistant City Manager my responsibilities and duties include overseeing several different departments within our local government, including water utilities, environmental services, general services, public works, human resources and parks and recreation.

I received a Bachelor of Business Administration degree from Baylor University in 1976. I am a member of the International City Management Association (ICMA), the Texas City Management Association (TCMA), American Water Works Association (AWWA), and Water Environment Federation, and for the past twenty years I have been a member of the Texas Farm Bureau. I currently serve on the Brazos G Regional Water Planning Group and am chair of the Waco Metropolitan Area Regional Sewerage System. I have also served on the United Way board. On a personal note, my family has had a farm in Falls County since 1961, and we continue to have a cow/calf operation there.

I want to thank the Subcommittee on Environment and Hazardous Materials for allowing me to testify regarding proposed amendments to CERCLA that would exclude animal manure and anything in it from the list of hazardous substances covered by the statute.

II. History and Characteristics of Lake Waco

Lake Waco is located in the southeastern portion of the Bosque River Watershed, Brazos River Basin, entirely within McLennan County, Texas, and on the northwestern edge of the Waco city limits. In or about 1928, construction of a dam to impound Lake Waco began and was completed around 1930.

Lake Waco is fed by the North Bosque, the Middle Bosque, and the South Bosque rivers, and by Hog Creek. The contributing watershed to Lake Waco is approximately 1,652 square miles with about 1,260 square miles in the North Bosque River watershed. The North Bosque River and its tributaries flow downstream and terminate in Lake Waco, which means that pollutants dissolved and entrained in the waters of the North Bosque are carried into, and ultimately deposited in, Lake Waco.[1]

In or about 1958, the City of Waco, with the assistance and support of the U.S. Army Corp of Engineers, began construction of a second larger dam on Lake Waco to provide additional flood control and drinking water. That project was completed in or about 1965.

III. Uses of and Importance of Lake Waco

Lake Waco represents the public drinking water supply for the City of Waco and a significant source of drinking water for many surrounding communities approximately 150,000 citizens.

Additionally, Lake Waco is used for a wide variety of recreational activities, including fishing, boating, swimming, and water skiing. Lake Waco shores also provide recreational activities and amenities in the form of parks, picnic areas, boat docks and camping facilities. Lake Waco is also put to a variety of other municipal purposes,

[1] Two maps of the North Bosque River Watershed and Lake Waco are attached as "Exhibit A"

including irrigation and conservation.

A clean and reliable source of drinking water is indispensable to the health and welfare of the citizens of Waco and is also essential to the existence and growth of business and industry in Waco. A substantial supply of clean water is also critical to the City's ability to maintain and attract industrial enterprises.

Lake Waco is the regional water supply. There is no viable alternative to the Lake as the regional water supply, and that will continue to be the case into the foreseeable future.

IV. The Effect of Dairy Waste

In the later half of the 1980's, large industrial dairy operators began moving into counties in the North Bosque River watershed. This influx of dairy operators into the watershed coincided with a massive increase in the amount of nutrients, and specifically phosphorus, which were being released into the North Bosque River and ultimately deposited into Lake Waco. The waste from these dairies is the single most important cause of the environmental problems that are occurring in the North Bosque River watershed and Lake Waco.

A. Dairies Produce Huge Amounts of Waste

A dairy cow generates up to 115 pounds of manure per day or more. If we look only at the fourteen dairies that either were or presently are involved in a lawsuit with the City of Waco, the permitted cows from those diaries would account for in excess of 1,600,000 pounds of manure per day. Considering that there are over 70 dairies in the North Bosque River watershed that have over 50,000 permitted head of dairy cattle, the amount of manure produced each day would be in excess of 5,750,000 pounds, or 2,875

tons of manure every day. In addition to the solid waste generated by the dairy cows, the cows produce large amounts of liquid waste.

In addition to the milking cows and the waste they produce, some dairies maintain additional cows on their dairy which are not milked on a daily basis. Those "dry cows", as they are called, can add another 7 to 15 percent to the overall size of the cow population on the dairy, and the amount of waste produced by those dairies.

Best management practices indicate that to properly dispose of waste, a dairy operator should maintain 1.5 to 3 acres of land per dairy cow. For example, a 2,000 cow dairy ought to have 3,000 to 6,000 acres of land to properly dispose of waste produced by their cows. The concentration of cows at dairies in the North Bosque River watershed is often far greater than that. In many instances, dairies in this region maintain less than 1/4 to 1/5 an acre per cow. One of the dairies in the lawsuit brought by the City of Waco has 396 permitted acres of waste application fields on which to dispose of the waste from 2,000 cows, and is seeking a permit amendment to increase herd size to 3,000 cows, without increasing the number of acres of permitted waste application fields. Another dairy involved in the City of Waco lawsuit is seeking to increase it's permitted number of cows to 2,500, despite the fact that the dairy in question only has 83 acres of permitted waste application fields.

The solid and liquid cow waste contains many pathogens and bacteria. Significantly, the huge amounts of solid and liquid waste generated by the dairy cows contain very high concentrations of phosphorus. A single dairy cow may produce as much as 40 pounds of phosphorus per year or more, which means permitted cows in our watershed would produce as much as 2,000,000 pounds of phosphorus each year.

B. Dairies in the North Bosque River Watershed Have Failed To Properly Handle Liquid and Solid Waste

The phosphorus being released by these dairies is a pollutant and is poisonous. Both CERCLA and the Clean Water Act recognize phosphorus as a hazardous substance.

Because of the enormous amounts of waste generated on a daily basis by dairies, it is critical that the dairy operators dispose of such waste properly and in a way which ensures that the waste does not reach the water supply. Many of the dairies in the North Bosque River watershed have failed to properly manage and dispose of the waste from their large commercial dairy operations. Two photographs are attached as "Exhibit B", which show a dairy in the watershed where waste has been over-applied on a waste application field, and that waste is running directly into a tributary of the North Bosque River. Their continued failure to do so has resulted in the pollution of Lake Waco and substantial damage and injury to the citizens of central Texas who rely on Lake Waco.

Liquid waste from cows and slurry resulting from washwater being combined with solid waste from cows is collected in "lagoons" located on the dairies. Because the lagoons are comprised of liquid waste, as well as some substantial percentage of solid waste, the contents of those lagoons is very high in phosphorus and other hazardous substances. Those lagoons are supposed to be specially and properly lined to ensure that the liquid waste is contained and does not leach into the ground and into the groundwaters and water supplies. Many of the dairies in this region have failed to construct and maintain their lagoons in a way which prevents leaching.

Dairy operators are supposed to control the levels of the lagoons to ensure that they do not overflow during rain and other events. Those overflows, which are referred to as unauthorized discharges, are to be prevented because, when they do occur, the waste

runs, in an uncontrolled manner, onto and over the land, off of the dairies and into the groundwaters and surface water supplies. Again, the large industrial dairies in the North Bosque River watershed have failed to control the levels of their lagoons and have improperly maintained their lagoons. These failures and omissions have resulted in wastewater running out of the lagoons and into the watershed. This runoff occurs not only in significant rains, but also at times when there is no or relatively small rainfall events. Such occurrences are in violation of these dairies' permits and in violation of state and federal law.

On those frequent occasions when the dairies have attempted to reduce the volume of materials in their lagoons by spreading it on their fields, they have frequently done so in a manner which results in contents of the lagoons entering the creeks, the watershed and the Lake Waco water supply.

These large industrial dairies also generate and have to dispose of enormous amounts of phosphorus-containing dry manure. With their permitted cows, the fourteen dairies that were or are defendants in the City of Waco's lawsuit alone would generate in excess of 800 tons of solid cow waste per day, which has to be disposed of on-site or is stored in piles while waiting to be transported off-site.

The dairies routinely store large amounts of solid waste on their property in waste storage areas. The waste in the waste storage areas will be disposed on-site or transported off-site. The phosphorus in such manure waste is present at levels which are far greater than those present in normal agricultural operations. Several times a year, there are heavy rains which turn portions of this stored waste into liquid manure that runs off of dairy waste application fields and into the watershed which supplies Lake Waco.

As a result of the conduct of some large industrial dairies in the North Bosque River watershed, large amounts of manure-laden waste make its way into the North Bosque River. This has dramatic detrimental effects on Lake Waco.

Dairies also dispose of some of the waste they generate by spreading it on waste application fields on their facilities. Because the land they possess is so relatively small in comparison to the number of cows they have confined in their pens, many of the dairies long ago exceeded the natural capacity of the soils and vegetation on their facilities to absorb the phosphorus or for the soil to otherwise assimilate the phosphorus.

Fields containing phosphorus at levels in excess of 60 to 80 parts per million (ppm) exceed the amount of phosphorus needed for optimal growth for any type of plant. At levels of 200 ppm and higher, not only is there far more phosphorus than can be used by plants, but there is also a very high risk that the phosphorus will run off of the fields and into the water supply at concentrations detrimental to the water supply. Once soil phosphorus reaches levels in excess of 200 ppm, the time required for the phosphorus levels to decline is considerable; that process can take years or even decades. Thus, the risk of runoff from fields with phosphorus levels in excess of 200 ppm is considerable and extended.

Many of the dairies in the North Bosque River watershed have greatly over applied waste to their waste application fields and have thereby caused those fields to reach soil phosphorus levels that exceed 200 ppm. In fact, over the past five years over 50 dairies in the watershed have applied so much waste that one or more of their fields have exceeded 200 ppm according to annual soil samples taken by the Texas Commission on Environmental Quality ("TCEQ"). During that same five year period,

there have been over 200 individual waste application fields on dairies in the watershed exceeding 200 ppm according to those same TCEQ samples. At the same time, these dairies have failed to properly maintain their waste application fields, and therefore the risk of runoff is even greater. These dairy CAFOs have crossed the line from beneficial use to waste disposal, and that disposal is adversely affecting our drinking water.

Any application of manure and waste products containing phosphorus to a waste application field in excess of 80 ppm is not for agricultural purposes; instead, it is simply for the disposal of waste. Even the TCEQ has concluded that when a field gets to 200 ppm there is a significant risk of runoff from that field during rainfall events into the streams and rivers in the watershed.

Large industrial dairies in the watershed have permits issued to them by the State of Texas which require them to conduct their operations in accordance with various laws, rules and regulations. Many of those dairies have operated their dairies and maintained their land in such a way as to have consistently and egregiously violated the applicable laws and regulations, and they continue to do so.

Discharges by dairies into the North Bosque Watershed have caused the quality of the water in Lake Waco to deteriorate. The manure-laden waste entering the watershed from the large industrial dairies along the North Bosque River pollutes and fouls Lake Waco. Among the problems such pollution creates, is that the phosphorous contained in such waste causes the growth of algae, which generates substantial taste and odor problems with the water in Lake Waco.

V. Taste and Odor Problems

Prior to the late 1980's the City of Waco experienced taste and odor problems

with the water from Lake Waco only on a sporadic and episodic basis. Those sporadic and episodic taste and odor problems in the water were resolved without the City of Waco having to resort to special water treatment methods.

In or about the late 1980's, large industrial dairy operators began moving into Erath County and into the North Bosque River watershed.

A. The Development of Taste and Odor Problems in Lake Waco

In about 1988 there were very notable increases in the levels of algae in Lake Waco. The mass and volume of algae increased to levels which had never before occurred in Lake Waco. There was and is a direct correlation between the increased levels of phosphorus in Lake Waco resulting from dairy waste runoff, increased levels of algae in the Lake and the taste and odor problems with the water in Lake Waco. As the algae level in the lake increased, so did the taste and odor problems with the water. The problems became so bad and so greatly affected the quality of the water that the City began using a different and additional treatment process in order to make the water acceptable for human consumption.

From about 1988 to December of 1996, the frequency and severity of the taste and odor problems with the water in Lake Waco continued to increase dramatically. There was a corresponding increase in the efforts and expense required of the City to reduce such taste and odor problems to an acceptable level. During that timeframe, those efforts increased in both frequency and degree.

In about December of 1996, the City of Waco experienced a tremendous algae bloom and a severe episode of taste and odor problems in the water in Lake Waco. Since that time the City of Waco has had to continually employ treatment methods it would not

otherwise use. Those treatment methods involve adding a substance to the water whose sole purpose is to reduce the substantial taste and odor problems of the water from Lake Waco. Unfortunately, the City's increasing efforts are also becoming increasingly less effective while at the same time becoming increasingly more expensive.

The City treats the taste and odor problems by putting additives into the water. The City is putting those additives into the water continually and at very high levels. Despite the high levels at which the additives are being put into the water, those additives are becoming much less effective at improving the taste and odor of water out of Lake Waco, and, over time, such problems with the City's water source have continued to increase. Additionally, the City is reaching the upper limit of the level at which those additives can be put into the water, because, at very high levels, those additives cause adverse side effects by producing undesirable chemical byproducts and by adversely affecting other aspects of the treatment process.

The water quality of Lake Waco is substantially impaired. The taste and odor problems with the water in Lake Waco are the result of the overabundance of blue-green algae, which is caused by the high concentrations of phosphorus coming into Lake Waco from the high phosphorus level waste application fields and the overloaded lagoons on the dairies in the North Bosque watershed.

The City of Waco has incurred substantial costs as a result of the inappropriate waste management practices of large industrial dairies in the watershed. Since 1995, the City of Waco has spent close to $3.5 million to address taste and odor problems in Lake Waco. Those expenditures are in excess of those which would have otherwise been made for water treatment. Ongoing remedies for treatment of taste and odor problems which

are caused by excessive phosphorus from dairies currently consume more than half (as much as 55 percent) of the City of Waco's chemical water treatment budget. Prior to 1996, that figure was about 10 percent.

Even though the City has been and continues to be very aggressive and diligent in its efforts to treat the taste and odor problems in Lake Waco's water in an efficient and effective manner, its current treatment methods are only able to remove approximately 70 percent of the substance which causes the offending tastes and odors. Although greatly reduced, the remaining 30 percent is still at a level which causes the water from Lake Waco to be quite offensive in taste and smell to the average person. Further, because the City is currently unable to sufficiently reduce such taste and odor problems and because of concerns about this problem increasing in the future, the City has found it necessary to add additional, advanced water treatment equipment and facilities to its two existing water treatment plants. Projected costs of the new water treatment equipment and facilities to deal with the taste and odor problems exceed $80 million dollars. The equipment and facilities necessary to treat the taste and odor problems will do nothing to improve the quality of water in Lake Waco other than hopefully eliminate the taste and odor problems caused by the phosphorus from the dairies. It is clearly unfair for our citizens to bear the costs of cleaning up someone else's waste.

Phosphorus and the resulting taste and odor problems are just one of the problems which have developed with the water in Lake Waco as a result of pollution from the dairies. Runoff and pollution from the dairies have resulted in pathogens and pollutants, in addition to phosphorus, entering and imperiling the water of the North Bosque River and Lake Waco. The pathogens, which are borne in the cow manure and which enter

Lake Waco, have created concern about the health of the citizens and the safety of the water to the citizens who fish, swim, ski and engage in other water activities in Lake Waco. If this pollution is allowed to continue unabated, there is the potential for substantial risk to the health and welfare of the users and consumers of Lake Waco water.

B. Phosphorus Released from Dairy Cow Waste is the Single Most Significant Cause of Taste and Odor Problems in Lake Waco

Segments of the North Bosque River upstream from Lake Waco have been placed on the national list of impaired waters after it was determined by both the TCEQ and the Environmental Protection Agency ("EPA") that these waters were severely impaired due to high concentrations of nutrients, principally phosphorus. This data has been confirmed through many scientific and peer-reviewed studies.

Two Total Maximum Daily Loads (TMDLs) for soluble reactive phosphorus in the North Bosque River were adopted by the TCEQ and approved by EPA in 2001. TCEQ approved a plan to implement these TMDLs. The TMDLs are designed to reduce the amount of phosphorus in the North Bosque River.

TCEQ reported in its July 2004 Status Report[2] on implementing the TMDLs that approximately 90% of the controllable phosphorus entering the North Bosque River originates from concentrated animal feeding operations (CAFOs) located in the watershed.

The Texas Institute for Applied Environmental Research (TIAER) at Tarleton State University in Stephenville, which performed much of the study supporting the TMDLs, has concluded that approximately 35-44% of the phosphorus in Lake Waco

[2] Attached as "Exhibit C"

comes from dairy waste application fields.[3] This is more remarkable given that those fields comprise only approximately 2% of the land use in the watershed.

TIAER studies have concluded that high concentrations of phosphorus in Lake Waco cannot be corrected without substantially reducing runoff of phosphorus from the dairy waste application fields. Dairies in the North Bosque River watershed have caused and continue to cause pollution to Lake Waco through their wrongful discharge of waste and other pollutants into the North Bosque River watershed.

The continued pollution caused by these large industrial dairies will result in future costs and expenses to investigate and treat the problem until a final remedy is developed and implemented. If this problem is not quickly addressed and the polluting conduct not abated, the current water supply may be irreparably damaged.

VI. The City of Waco Has Engaged in Considerable Efforts to Protect Water Quality in Lake Waco

For the better part of the last decade, the City of Waco has been involved in several different efforts to resolve the impact of phosphorus loading in Lake Waco. The City of Waco has met with stakeholder groups, which included the Bosque River Advisory Committee, TIAER, the Texas Association of Dairymen, the Bosque River Authority, and the TCEQ, to try and find a meaningful and effective solution to the problems in the North Bosque River watershed.

After eight years of attempting to resolve these issues by meeting and negotiating with dairy operators in the watershed, the City of Waco was unable to achieve any meaningful solution to the problem. In fact, the City of Waco was unable to get any of the dairies to even admit that they were contributing to the problem, despite the fact that

[3] Attached as "Exhibit D"

every known public or private study that has examined these issues has concluded that the dairies are the most significant cause of the overloading of phosphorus into Lake Waco.

As a result of the dairies unwillingness to resolve these issues, the City of Waco sent out letters to fifteen different dairies in the watershed notifying those dairies that a suit would be filed by the City of Waco against those dairies unless those dairies contacted the City of Waco within 60 days and sought to resolve the issue. Only one dairy responded to this letter, and the City has worked with that dairy to resolve the issues and has not sued that dairy.

After these extensive efforts to resolve these issues failed to result in any meaningful agreements to improve water quality, the City of Waco brought suit against fourteen large industrial dairies in the North Bosque River watershed, based on the poor TCEQ regulatory compliance records of those dairies. This lawsuit is brought under both the federal Clean Water Act and the federal Superfund statute (CERCLA) and its goal is primarily to bring about improvements and modifications of waste handling practices of the concentrated animal feeding operations ("CAFOs") in the watershed. CAFOs are large industrial agricultural operations that confine large numbers of animals in a manner that vegetation cannot be sustained in the confinement areas. Dairies are considered CAFOs if they confine more 200 mature dairy cows.

Since the filing of the lawsuit against the fourteen dairies by the City of Waco as a last resort effort to try and clean up Lake Waco there have been numerous opportunities for citizens to come to Waco City Council meetings during the public comment agenda items and express their opposition to the continued prosecution of this lawsuit. There

have been no complaints by the citizens of Waco about this suit. In addition, the local newspaper, the Waco Tribune-Herald, has afforded the opportunity for dairy representatives to write guest columns criticizing the lawsuit as an unnecessary waste of City funds, but we are not aware of any letters to the editor by Waco citizens complaining of the lawsuit. When a governmental body such as the City of Waco can take such action and receive no criticism from its citizens, this is a very strong indication that the citizens of Waco, who are the ones who have to drink and smell the water from Lake Waco, support the City's actions on this matter. In addition, the editorial board of the Waco Tribune-Herald has on numerous occasions indicated that the lawsuit is justified in view of the problems being caused by the dairies and the importance of Lake Waco as the drinking supply for 150,000 local citizens.[4]

The City's lawsuit to date has been highly effective. The City has settled with eight of the fourteen original dairy defendants. Under the settlements, the dairies have agreed to certain changes in their management practices which the City believes will let them continue agricultural operations and at the same time protect the river and the lake. None of the dairies that have settled with the City of Waco have paid money to settle the lawsuit. In one case, an insurance company for one of the dairies paid a cash settlement on behalf of that dairy, practically all of which the City of Waco then returned to the dairy operator in exchange for a conservation easement prohibiting the over polluted land on that dairy from ever again being used as a CAFO, but allowing it to be used for other agricultural purposes. The lawsuit is still pending in the United States District Court for the Western District of Texas--Waco Division, before Judge Walter Smith, against the six CAFOs that have not settled with the City. The lawsuit is set for trial in May 2006.

[4] See examples of editorials attached as "Exhibit E"

In this lawsuit, the defendant dairies have contended that phosphorus in dairy manure and liquid waste is not a "hazardous substance" under CERCLA. This same argument was made by the poultry industry in response to a lawsuit filed by the City of Tulsa and the United States District judge in Oklahoma ruled that the phosphorus in manure, under the mixture rule, is a hazardous substance.[5] The defendant dairies also sought dismissal of the City of Waco's lawsuit under rule 12(b), Federal Rules of Civil Procedure, arguing that the phosphorus in dairy cattle manure is not a hazardous substance under CERCLA, but Judge Smith denied the dairies' motion to dismiss and referenced the "mixture rule" as did the District Court in Oklahoma.

VII. Proposed Amendments to CERCLA

Having lost twice in court in attempts to argue that large quantities of phosphorus are not a hazardous substance under CERCLA, these large industrial polluters are attempting to get Congress to amend CERCLA to exempt "manure" from the definition of "hazardous substance", and mischaracterize the proposed amendment as one needed to "protect family farms" and the agricultural industry in general. This exemption would go far beyond just an effort to protect family farms or the agricultural industry in general but would instead exempt CAFOs, which are large industrial operations, or any other industry that pollutes with manure, from liability under CERCLA. If the amendment becomes effective, as it has been proposed, in all probability the dairies who remain defendants in the City of Waco lawsuit will argue that the Court must dismiss the City's pending CERCLA claims. Further, the amendment will allow all other dairies in the watershed of Lake Waco to pollute free and clear of potential liability under CERCLA for the consequences of their actions.

[5] *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263 (N.D. Okla. 2003)

An amendment could easily be drafted to exempt routine agricultural operations that produce manure, but that would not exempt large industrial CAFOs. However, such an amendment is not necessary to protect family farms, or even the agricultural industry in general. CERCLA already includes an exemption from liability for the "normal application of fertilizer."[6] When a family farm or a any agricultural operation applies manure to its fields in an amount necessary to support crops, that farm is not liable under CERCLA because of the already existing exemption in CERCLA for the normal application of fertilizer. It is only when manure is applied in amounts that exceed what is necessary to support crops that there is potential CERCLA liability. For example, some of the dairies involved in the City of Waco lawsuit have waste application fields that exceed 800 ppm of phosphorus when anything over 80 ppm is well beyond the amount necessary to facilitate the growing of corpse. The law as it currently exists strikes a balance by allowing lawsuits to be brought against those large industrial CAFOs that are not fertilizing their fields but are instead dumping waste on their fields and adversely impacting the environment by doing so, but still protects normal agricultural operators when applying manure or fertilizer to grow crops.

In addition, the requirement under the current law that anyone suing for response costs under CERCLA must prove that their response action complies with the National Contingency Plan further protects agricultural operations, and even to some extent large industrial operations, from CERCLA lawsuits by disgruntled neighbors or from frivolous claims. It is only entities like cities, counties, or states that can reasonably show that they have completed the necessary studies and analysis', considered other available remedies,

[6] 42 U.S.C. 9601(22).

elected reasonable cost alternatives, and taken the other steps necessary to comply with the national contingency plan.

As further evidence that the proposed amendment to CERCLA is not needed to prevent a rash of litigation against family farms or other agricultural interests, the City of Waco, in researching for and preparing its lawsuit against these dairies, is aware of only a few lawsuits filed against large industrial agricultural operations under CERCLA and is not aware of any suit filed against family farms or other routine agricultural operations that are not already regulated as CAFOs. The fact that only a few lawsuits have been filed nationally, which only involve large commercial operations as defendants, is certainly not an indication that family farming or normal agricultural operations are being burdened with litigation costs or otherwise being threatened by CERCLA as it is presently written.

CAFOs are a recognized source of potential pollution of the environment (by reason of their disposal of manure) and, for that reason, like other industries whose operations are a substantial risk of pollution, they cannot operate without a Federal or state issued permit. For the same reasons CAFOs are subject to permit requirements, whereas routine agricultural operations are not, CAFOs should also be subject to liability under CERCLA even though an exemption of routine agricultural disposal of manure would be appropriate.

The City of Waco is not opposed to an amendment that would specifically exempt manure produced by traditional family farms or other routine agricultural operations from liability under CERCLA, even though such an amendment is not needed for the reasons above discussed. However, the City is opposed to the amendment, as it has been

proposed, because it is so broad that it would exempt from liability large industrial CAFOs that spread manure for disposal purposes rather than in a manner intended for beneficial agricultural use.

CERCLA is critical to ensuring a satisfactory outcome to not only the City of Waco's lawsuit against dairies in the North Bosque River watershed, but to ensuring that any municipality or other governmental entity will be successful in protecting it's citizens drinking water from the harmful over-application of phosphorus containing waste to waste application fields. It is true that the City of Waco could pursue its lawsuit under the Clean Water Act, but that piece of legislation does not afford the broad range of remedies that are available under CERCLA. Specifically, that statute does not allow for private recovery and thus does not afford the City of Waco an avenue to recover for its response costs. As can be seen from the City of Waco settlements with eight dairies, often just exposure to liability for response costs will cause industrial polluters, like the dairies in our watershed, to adopt better and more environmentally sound waste management practices. CERCLA lawsuits do not always result in monetary awards, sometimes they result in corrective action to clean up the environment. It is also not unreasonable or unfair for large industrial agricultural operations, like the dairies in our watershed, to be liable for the response costs that they actually cause others to incur in accordance with the National Contingency Plan, which is designed to ensure a proper and quality response to pollution. Put simply, without liability under CERCLA for the over-application of manure it will be nearly impossible for municipalities like Waco or other governmental entities to get effective and meaningful relief against large industrial

operations that pollute our nations waters by adding large quantities of phosphorus and other nutrients to valuable water supplies.

VIII. Conclusion

Based on the foregoing discussion, and because of all of the harmful effects that will result if large commercial dairies in the watershed are allowed to continue to over-apply manure without any risk of incurring liability under CERCLA, we ask that the members of this Subcommittee and of the United States House of Representatives oppose any amendment to CERCLA that would exclude manure from the definition of hazardous substance. Thank you for your time and your thoughtful consideration of this testimony.